Supreme Court, U.S.
FILED

021437 MAR 22 2003

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 2003

Aaron Raiser,
Petitioner,

v.

Honorable Tom Daschle,
Honorable Trent Lott,
United States Senate
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

Petition for Writ of Certiorari

Aaron Raiser, Pro Se
P.O. Box 4870
Ontario, CA 91761

Questions Presented for Review

1. Is it right for the Senate judiciary to be empowered to deny the United States Senate the opportunity to give their "advice and consent", as required by the Constitution, to presidential judicial nominees because that particular nominee is not of the same political ideology as the controlling party of the Senate?

2. Does not the United States Constitution and the intent of the framers of the United States Constitution prohibit the Senate from withholding their advice and consent simply because the dominant party of the Senate does not approve of the political ideology of the nominee?

3. Is not the "advice and consent" role of the Senate a ministerial role to be followed according to law and a duty owed to the people and thus subject to a writ of mandamus?

4. Is it not possible that if the Senate is not following the Constitution as mandated that they could injure a person in so doing?

5. Can the trial court dismiss a case with prejudice when that court does not maintain jurisdiction for the case?

TABLE OF CONTENTS

	Page
Questions Presented for Review	*i*
Table of Contents	*ii*
Table of Citations	*iii*
Opinions Below	1
Jurisdictional Statement	1
Constitutional Provisions	2
Statement of the Case	3
Argument - Reasons for Granting the Writ	4
I. The current practice of the United States Senate with respect to how they give their advice and consent relative to presidential judicial nominees is not supported by the words of the constitution.	4
II. The current practice is not supported by the intent of the Constitution	6
III. Injury-in-fact to Petitioner	9
IV. Redress of injury is supported by *Marbury v. Madison*.	12
V. District Court lacked juridiction to deny Plaintiff s motion to refile complaint in District Court of Columbia.	14
Conclusion	14

TABLE OF CITIATIONS

Constitutional Provisions Page

U.S. Constitution Article II/2 2, 3, 4

Cases

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 11, 12

Marbury v. Madison, 5 U.S. 137 (1803) 12, 13

United States v. SCRAP, 412 U.S. 669 (1974) 11, 12

Text and Treatise

George Curtis, *Constitutional History of The United States*, Harper & Brothers, Franklin Square 1889..... 5, 9

History on the Committee of the Judiciary, United States Senate, 1816 - 1961. Ch. IV. Government Depository Y 1.1/3 97-18 3, 8

The Federalist, reprinted from the original text of Alexander Hamilton, John Jay, and James Madison, edited by Henry Cabot Lodge, G.P. Putnam s Sons, 1888. 6, 7

APPENDIX

Appendix A - United States Court of Appeals for the Tenth Circuit affirming the Order of dismissal of the district court.

Appendix B - United States District Court For The District of Utah Order dismissing petitioners case

OPINIONS BELOW

On July 30, 2002 the District Court entered an Order dismissing petitioner's case stating the injury to petitioner due to the delay resulting from the current Senate confirmation process was remote. (Appendix B).

On December 23, 2002 the Tenth Circuit Court of Appeals entered an unpublished Order affirming dismissal. (Appendix A).

JURISDICTIONAL STATEMENT

The date the order and judgment was entered by the Court of Appeals for the Tenth Circuit was December 23, 2002.

This Court's jurisdiction to review, on a writ of certiorari, the decision of the United States Court of Appeals for the Tenth Circuit affirming the ORDER of dismissal of the district court is conferred by 28 U.S.C. § 1254.

Petitioner certifies that copies of this Writ were mailed to: Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

Constitutional Provisions

U.S. Constitution - Article II:

2. "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

Statement of the Case

This is a civil rights case arising out of the United States Senate not complying with their ministerial role - as outlined in the Constitution - to the people, in not correctly providing their advice and consent relative to presidential judicial nominations. The relief sought is that of a writ of mandamus compelling the United States Senate to follow the constitution in giving advice and consent relative to presidential judicial nominations.

In 1868 the United States Senate voted to set the Constitution aside and instead allow the Senate judiciary to decide whether the United States Senate gives its advice and consent relative to presidential judicial nominees. See *History on the Committee of the Judiciary, United States Senate, 1816 - 1961.* Ch. IV.

On October 15, 1999 a vacancy occurred in the Federal Court of Appeals for the Tenth Circuit. This vacancy remains open.

On 1 November, 1999 a vacancy occurred in the federal judicial district of Utah. Said vacancy was not filled until May 13, 2002.

On 9 November, 2001, Petitioner filed a civil rights complaint against the Respondents in the present case alleging that their not following the constitution with respect to presidential judicial nominations caused undue and unecessary delay in another federal case Petitioner had previously filed in the federal judicial district of Utah and thus damaging Petitioner's ability to prove his case as that case relied on witnesses to remember detailed events etc. among other reasons.

The case that was delayed was filed previously and a motion to dismiss that case was not decided until 7 months after its filing and 10 months after the filing of the complaint.

Although some delay is expected, a significant and *quantifiable* delay is due to the conduct of the Respondents not following the constitution.

Both Respondents Tom Daschle and Trent Lott are being sued in their official representative capacities as Majority and Minority leaders of the United States Senate.

Argument - Reasons for Granting the Writ

I.
The current practice of the United States Senate with respect to how they give their advice and consent relative to presidential judicial nominees is not supported by the words of the constitution.

A. What the Constitution states

U.S. Constitution - Article II:

2. "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

Here the words "the Senate" mean the Senate.

B. Why the Constitution says this

i. Power balance

"The rule of the Confederation, which had required the assent of nine states in Congress to every treaty or alliance, had been found to work great inconvenience; as any rule must do which should give to a minority of states power to control the foreign relations of the country." p. 581, *Constitutional History of The United States*, George Curtis, Harper & Brothers, Franklin Square 1889.

In forming the new govenrment there was a concern of a minority controlling things such as treaties for the entire country. The Framers of their new government did not want a minority of a group to control the majority as it had in the past. In the new government the Senate would have power to ratify treaties and thus they required the entire Senate to give their consent.

ii. President represents voice of the people

"The theory of the Constitution undoubtedly is, that the president represents the people of the United States generally, and the senators represent their respective states; so that, by the concurrence which the rule thus requires, the necessity for a fixed quorum of the states is avoided, and the operations of this function of the government are greatly facilitated and simplified." *Id.* p. 581

iii. Senate represents voice of the states

However, in the current process the Senate, instead of representing their states in giving their advice and consent relative to presidential judicial nominees, represent the voice of the controlling party of the senate via the Senate judiciary committee.

C. Implications of what the Constitution says

Thus it would appear that the constitution implies that the entire senate is to consider the judicial nominees of the president. It is also true that it is done for a reason.

II.
The current practice is not supported by the intent of the Constitution.

A. Constitutional Convention - their words

Alexander Hamilton, delegate to the Constitutional Convention, in *The Federalist* article Number LXXVI states:

"The president is 'to nominate, and by and with the advice and consent of the senate, to appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not otherwise provide for in the constitution...'" *The Federalist*, Pg. 471.

"It has been observed in a former paper, that the true test of a good government, is its aptitude and tendency to produce a good administration . If the justness of this observation be admitted, the mode of appointing the officers of the United States

contained in the foregoing clauses, must, when examined be allowed to be entitled to particular commendation. It is not easy to conceive a plan better calculated to promote a judicious choice of men for filling the offices of the union;..." *Id.* Pg 471.

"He [the president] will have fewer personal attachments to gratify, than a body of men who may each be supposed to have an equal number, and will be so much the less liable to be misled by the sentiments of friendship and of affection. There is nothing so apt to agitate the passions of mankind as personal considerations, whether they relate to ourselves or to others, who are to be the objects of our choice or preference. Hence, in every exercise of the power of appointing to offices by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, apartialities and antipathies, attachments and animonsities, which are felt by those who compose the assembly." *Id.* Pg 472 - 73.

Note here the words "those who compose the assembly" and nowhere does it say "those who compose the majority party of the assembly". Neither does it state "those who compose the Senate judiciary committee of the assembly".

The apparent theory obviously is that a "body of men" [including women] is less susceptible to undue influence. In the current process, that safeguard has been completely removed and now that body of men consists of only the Senate judiciary committee which is indeed susceptible to undue influence.

Also noteworthy is the lack of concern that the Senate would allow the ruling party to derail a nomination for political reasons etc. The reason is simple - since the entire Senate would be giving their advice and consent, as the constitution states, then there would exist no opportunity for such a predicament. Any potential predicament was solved by having the Senate give their advice and

consent.

B. Constitutional Convention - their intent

The concept of the majority party completely denying a presidential nomination prior to the entire assembly of men voting or otherwise giving their advice and consent defies the entire intent of the framers of the constitution.

Here, "assembly of men" [including women] means the entire Senate. Further, nowhere in Hamilton s writings or any other of the delegates to the Constitutional convention did they refer to a sub-group of the senate making the "advice and consent" role opposing a particular nominee or that the controlling party of the senate determine the outcome of a nominee. In fact the discussions of the constitutional convention seemed to disfavor such control over the nomination process.

"A man disposed to view human nature as it is, without either flattering its virtues, or exaggerating its vices, will see sufficient ground of confidence in the probity of the Senate , to rest satisfied, not only that it will be impractible to the executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of the magistrate." *Id.* p. 476.

Pointed action is taken to reduce the chance of undue influence that could influence the outcome of a nomination, they, the framers, created a scheme where the president would have to exert influence on a majority of the Senate (a majority of the entire Senate); what is noted is that when the decision making is given to a sub-group of the Senate then the likelihood of undue influence is acting on a small body of the Senate - in this case 19 - and thus the

current process defeats the intent of the Constitutional convention. Here the undue influence is on the Senate itself by the controlling party of the Senate via the Senate judiciary committee.

It is interesting that Hamilton only spoke of the check that their wording would have on the nomination process - nothing is said of the Senate using their power improperly, the reason, no one could influence the entire Senate or it would be difficult. It is happening though by virtue of the process installed in 1868 in the Senate judiciary committee deciding whether the entire senate would give their "advice and consent" regarding a presidential judicial nominees. The concept of a sub-group of the Senate controlling the entire Senate was foreign to the constitutional convention. It was not in the wording of the constitution so they never concerned themselves with it. The wording of the constitution prevented it.

Petitioner reiterates:

"The theory of the Constitution undoubtedly is, that the president represents the people of the United States generally, and the senators represent their respective states;" p. 581, George Curtis, *Constitutional History of The United States*, Harper & Brothers, Franklin Square 1889.

III.
Injury-in-fact to Petitioner.

A. Direct Injury to Petitioner

i. An unnecessary injury

Petitioner filed a civil rights case against a municiapal defendant in the District of Utah Federal Court. (#2:01CV876). Defendant in that case filed a motion to dismiss. That motion to dismiss was eventually decided in Petitioner's favor, however not until 10 months until after the complaint was filed. Collateral problems were introduced as a result as Petitioner was unable to obtain discovery from the Respondents until after the motion to dismiss was decided. Witness information was critical in the case. Petitioner needed detailed information from said witnesses and much, if not all of the evidentiary information relied on witness memory and memory decreases over time. Said witness information would have been also critical at trial. The case eventually was settled out of court favorably for Petitioner, however Petitioner's decision to settle out of court resulted in part due to Petitioner's realization that critical information had become lost or diminished.

Mathematically, the delay is attributable to the conduct of the Respondents. Where a Federal Court in a given district is to have 8 judges and has 7, there is a delay due to the 7 judges handling the extra caseload. It is quantifiable. It is a delay resulting from the Respondents not following the Constitution in fulfilling their ministerial role in giving their advice and consent relative to presidential judicial nominees. The line where Petitioner is injured by Respondents is drawn where the Respondents fails to follow the Constitution.

Petitioner also has a separate case on appeal at the Tenth Circuit Court of Appeals. (#03-3042). The Tenth Circuit Court of Appeals has one vacancy currently and until recently had two vacancies. A delay attributable to the Respondents also exists in the adjudication of that case injuring Petitioner in a delay in bringing about a resolution to that case.

The delay that has been imposed on the Petitioner's litigation and the subsequent injuries resulting from that delay are attributable to the majority party of the senate, via the Senate judiciary committee, grappling with the president and the "political ideology" of his nominations.

Worded slightly different, the delay that has been imposed on the Petitioner's original district court case is a delay attributable to the Senate not following the Constitution.

When a case is delayed it causes collateral difficulties such as a delay in obtaining witness testimony whose ability to remember is diminished and thus the aid to trier-of-fact becomes diminished. This in turn can affect the outcome of all or part of a case. This can also affect any monetary settlement. Petitioner maintains that is what has happened in the original district court case that was delayed.

Generally though there is much greater difficulty in presenting a case when there is needless delay is introduced.

B. Injury not to remote or speculative

The injury is concrete, not speculative. The injury is mathematically attributable to the Respondents. It is a quantifiable injury.

Neither is the causative link of the injury to the respondents too remote. See *Duke Power Co. v. Carolina Environmental Study Group* 438 U.S. 59 (1978) (without the damage liability limit which the Price-Anderson Act provided for the nuclear industry, the building of nuclear reactors would not continue, and this would spare them immediate environmental injuries) and *United States v. SCRAP*, 412 U.S. 669 (1974) (the Interstate Commerce

Commission's approval of a surcharge on railroad freight rates, claimed to cause economic, recreational and aesthetic harm in the Washington metropolitan area actionable).

In *Duke Power Co.* the court held:

"Once there is proof of injury to the plaintiff and a casual link between such injury and the conduct he is challenging, it is generally not necessary to further demonstrate a connection between the injuries he claims and the Constitutional rights being asserted for standing to exist. Outside the context of taxpayers' suits, a litigant need demonstrate only injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case and controversy' requirement of article III of the Constitution." *Duke Power Co. v. Carolina Environmental Study Group* 438 U.S. 59, 98 (1978).

Also, Petitioner believes he deserves the chance to prove his injury at court. See *United States v. SCRAP*, 412 U.S. 669 (1974) (holding that SCRAP deserved the chance to show that the alleged injury would occur immediately in court).

IV.
Redress of injury is supported by *Marbury v. Madison.*

A. *Marbury v. Madison* foundation

It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl, Com. 109. There are some injuries which can only be redressed

by a writ of mandamus, and others by a writ of prohibition. *Marbury v. Madison* 5 U. S. 147 (1803).

B. Discretionary v. Ministerial duties

"The secretary of state acts, as before observed, in two capacities. As the agent of the president, he is not liable to a mandamus; but as a recorder of the laws of the United States, as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions, &c. he is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control but that of the laws." *Marbury v. Madison* 5 U. S. 149 (1803)

Thus, the Petitioner is claiming that the senate in giving their advice and consent is acting in a ministerial duty and are governed in those acts by the law of the land outlined by the framers of the Constitution. Thus they are subject to a writ of mandamus if they do not fulfill that duty according to law.

The Senate's legislative role is discretionary.

C. *Marbury v. Madison* indicates the Senate amenable to a writ of mandamus for failing its ministerial duties

Since the Senate is acting in a ministerial capacity and not following the Constitution in performing that duty, they are amenable to a writ of mandamus for not fulfilling that duty as outlined.

V.
District Court lacked jurisdiction to deny Plaintiff's motion to refile complaint in District Court of Columbia.

If venue is incorrect in the District Court of Utah then the trial court should have had no jurisdiction to dismiss the case with prejudice.

CONCLUSION

Petitioner asks that the district court's dismissal of the case with prejudice be vacated and that the case be dismissed without prejudice.

This shall allow Petitioner to refile the complaint in the Federal District Court of Columbia.

Alternatively, Petitioner asks this Court to decide the matter.

Specifically, Petitioner asks that the Respondents be required to follow the Constitution and allow the full Senate to give their advice and consent relative to presidential judicial nominees.

In so doing the injury to petitioner shall be redressed.

Respectfully submitted,

_____

Aaron Raiser

Appendix A - Tenth Circuit Order Upholding dismissal

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

AARON RAISER, Plaintiff-Appellant,	:	
v.	:	No. 02-4142 D.C. No. 01-CV-894
Honorable TOM DASCHLE;	:	(D. Utah)
Honorable TRENT LOTT; UNITED STATES SENATE,	:	
Defendants-Appellees.		

ORDER AND JUDGMENT

Before **SEYMOUR, HENRY**, and **BRISCOE**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Appendix A

Plaintiff Aaron Raiser appeals the district court s dismissal of his complaint for lack of standing. We exercise jurisdiction pursuant to 28 U.S.C./1291 and affirm.

Raiser, a Utah resident, filed this action seeking an order that the "United States Senate change its rules such that presidential judicial nominations not be denied full Senate consideration based on the decision of the Senate Judiciary Committee." Amended Complaint at 6. The district court granted defendants' motion to dismiss, finding that Raiser lacked standing "due to lack of injury." Order at 2.

We review de novo the district court s order of dismissal with prejudice for lack of standing. See United States v. Colorado Supreme Court, 87 F.3d 1161, 1164 (10th Cir. 1996).

[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" an invasion of a legally protected interest which is (a) concrete and particularized . . ., and (b) actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotations omitted). See Colorado Taxpayers Union, Inc. v. Romer, 963 F.2d 1394, 1396 (10th Cir. 1992). "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." Lujan, 504 U.S. at 560 n.1. The party invoking federal jurisdiction bears the burden of establishing these elements. Id. at 561.

Appendix A

Raiser has failed to meet his burden. The pendency of other litigation initiated by Raiser is insufficient to give him standing to challenge the Senate s referral of judicial nominations to the Judiciary Committee. Further, his claims of alleged delay because of vacancies in the courts do not establish an injury.

Raiser also asks that the district court's dismissal of his case with prejudice be vacated and that the case be dismissed without prejudice so that he can refile in another district. Where as here a plaintiff cannot cure jurisdictional defects in his complaint, it is proper for the district court to dismiss with prejudice. Curley v. Perry, 246 F.3d 1278, 1282 (10th Cir. 2001). Even if the dismissal were without prejudice, res judicata would bar Raiser from relitigating this case in another court. "Principles of res judicata apply to jurisdiction as well as to other issues." Stewart Sec. Corp. v. Guaranty Trust Co., 597 F.2d 240, 242 (10th Cir. 1979).

AFFIRMED.

Entered for the Court

s/_____

Mary Beck Briscoe

Circuit Judge

Appendix B - District Court s Order Dismissing case

In The United States District Court For The District of UtahCentral Division

---

AARON RAISER, Plaintiff, : Case No. 2:01-CV-894

v.

HONORABLE TOM DASCHLE, et. al., Defendants.

Before the Court is defendants' motion to dismiss plaintiff's amended complaint. In the amended complaint, plaintiff contends that the United States Senate employs an unconstitutional procedure to evaluate presidential judicial nominees. Specifically, plaintiff alleges that because the Senate Judiciary Committee preliminarily reviews presidential judicial nominations and prevents some nominations from being evaluated and voted upon by the entire Senate, the Senate is acting contrary to Article II of the United States Constitution.[1]

---

[1] Article II provides in relevant part that the President, "by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States." Plaintiff argues that the words "by and with the advice and consent of the Senate" require that the entire Senate as a whole evaluate presidential judicial appointments.

Appendix B

Plaintiff also filed a motion to change venue to the District of Columbia District Court on the grounds that the defendants "have their central place of business in Washington, D.C." and this "action alternatively could have been brought in the District Court for the District of Columbia. [sic]

In the motion to dismiss, defendants argue that the allegations in the amended complaint present non-judiciable political questions. In addition, defendants contend that service was improper, that the Constitution s Speech and Debate clause bars this suit, that this Court lacks personal jurisdiction over the defendants, and that the plaintiff lacks standing in this case. Defendant [sic] counters, inter alia, that standing exists because the Senate's evaluation process has led to a shortage of federal judges in the judicial district of plaintiff's personal residence, and that this shortage has caused injury in the form of delays in the processing of cases.

The Court agrees with the defenants that plaintiff lacks standing in this case due to lack of injury. To prove standing, plaintiff must show an injury in fact and a casual connection between the injury and the conduct complained of. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The injury in fact requirement must consist of "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. at 560. Furthermore, federal courts should refrain from "adjudicating 'abstract questions of wide public significance' which amount to generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471

(1982); *Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1396 (10th Cir. 1992).

The allegations in this case represent just the type of generalized grievances the *Valley Forge* court warned of and do not constitute an injury in fact to this particular plaintiff. Furthermore, the chain of causation between the Senate s practices in considering nominations and the delays in processing nominations for judicial positions existing in the District of Utah is too remote to satisfy the second prong of standing.

Accordingly, defendant s motion to dismiss plaintiff s amended complaint is GRANTED with prejudice. This ruling renders the motion to transfer venue moot and it is therefore DENIED. IT IS SO ORDERED.

DATED this 30th day of July, 2002.

s/_____
Dee Benson, Judge
United States District Court

(2)

Supreme Court, U.S.
FILED
APR 28 2003
CLERK

No. 02–1437

In the Supreme Court of the United States

OCTOBER TERM, 2002

AARON RAISER, PETITIONER

v.

HONORABLE TOM DASCHLE, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS UNITED STATES SENATE AND UNITED STATES SENATORS BILL FRIST AND TOM DASCHLE IN OPPOSITION TO THE PETITION FOR CERTIORARI

PATRICIA MACK BRYAN,
(Counsel of Record),
Senate Legal Counsel,
MORGAN J. FRANKEL,
Deputy Senate Legal Counsel,
GRANT R. VINIK,
THOMAS E. CABALLERO,
Assistant Senate Legal Counsel,
Office of Senate Legal Counsel,
642 Hart Senate Office Building,
Washington, D.C. 20510.
(202) 224–4435
Counsel for Respondents.

APRIL 2003.

7PP

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner lacked Article III standing to bring this suit challenging the United States Senate's procedures in fulfilling its constitutional responsibility to provide advice and consent on judicial nominations.

2. Whether the court of appeals properly held that the incurable jurisdictional defects supported dismissal of the amended complaint with prejudice.

In the Supreme Court of the United States

OCTOBER TERM, 2002

NO. 02–1437

AARON RAISER, PETITIONER

v.

HONORABLE TOM DASCHLE, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS UNITED STATES SENATE AND UNITED STATES SENATORS BILL FRIST AND TOM DASCHLE IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondents United States Senate and United States Senators Bill Frist[1] and Tom Daschle submit this brief in opposition to the petition for a writ of certiorari filed by *pro se* petitioner Aaron Raiser.

STATEMENT OF THE CASE

This *pro se* petition arises out of an amended complaint filed by Aaron Raiser in the United States District Court for the District of Utah. Petitioner alleged that for a number of years the Senate has violated its constitutional duty to provide advice and consent by referring judicial nominations to the Senate Judiciary Committee. Amd. Compl. ¶¶5–10. Petitioner claimed that the Senate Judiciary Committee's consideration of such nominees has delayed the filling of judicial vacancies in the federal courts,

[1] Senate Majority Leader Bill Frist is automatically substituted for his predecessor in office, Senator Trent Lott, as a defendant in this action. Fed. R. App. P. 43(c)(2).

which has allegedly prolonged the adjudication of other civil litigation that petitioner filed in the Utah District Court. *Id.* ¶¶ 11,12.

The district court dismissed the amended complaint with prejudice for lack of standing. No. 2:01–CV–894 (D. Utah) (Benson, C.J.), Appendix to Petition (hereinafter "Pet. App.") at 5a–6a. The court held that petitioner's allegations "represent just the type of generalized grievances . . . [that] do not constitute an injury in fact." *Id.* at 6a. The court further held that the "chain of causation" between petitioner's alleged injury and the conduct complained of "is too remote to satisfy the second prong of standing." *Id.* [2]

On appeal, the United States Court of Appeals for the Tenth Circuit summarily affirmed. No. 02–4142 (per curiam) (Seymour, Henry, Briscoe, JJ.), Pet. App. at 3a. The court held that "[t]he pendency of other litigation initiated by Raiser is insufficient to give him standing to challenge the Senate's referral of judicial nominations to the Judiciary Committee." *Id.* The court further held that the dismissal with prejudice was proper because the amended complaint's jurisdictional defects were incurable and because *res judicata*, in any event, would bar relitigation of the jurisdictional dismissal. *Id.*

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because it fails to raise any "compelling" federal question, Sup. Ct. R. 10, warranting this Court's attention. The decision below is in harmony with decisions of this Court and of other circuits and reflects a proper understanding and application of established principles delimiting the jurisdiction of federal courts under Article III of the Constitution.

---

[2] Other bases for dismissal presented to, but not addressed by, the district court because of petitioner's lack of standing were lack of personal jurisdiction, improper venue, lack of proper service, legislative and sovereign immunity, and nonjusticiability.

I. Article III confines the jurisdiction of the federal courts to the resolution of actual "Cases" and "Controversies." U.S. CONST. art. III, § 2. To meet this threshold jurisdictional requirement, a plaintiff must demonstrate injury in fact, a causal connection between the injury alleged and the conduct complained of, and a likelihood that the injury is redressable. *Bennett v. Spear,* 520 U.S. 154, 167 (1997). Petitioner satisfied none of these three irreducible constitutional minimum requirements of Article III standing.

First, the courts below correctly held that petitioner lacks "injury in fact." Pet. App. at 3a, 5a–6a. Petitioner's allegations about the Senate's (i) "not upholding the Constitution and performing their duty"; (ii) "hinder[ing]" the judicial system "from performing its con[s]titutional[l]y mandated responsibility"; and (iii) "society as a whole being to some degree harmed by an overburdened judicial system," Amd. Compl., ¶¶3(b), 11, are plainly "generalized grievance[s] about the conduct of government," *Flast v. Cohen*, 392 U.S. 83, 106 (1968), that cannot confer Article III jurisdiction.

Nor did petitioner suffer "injury in fact" from alleged delays in the adjudication of other civil litigation. The court of appeals correctly found that petitioner's "claims of alleged delay because of vacancies in the courts do not establish" cognizable injury. Pet. App. at 3a. Indeed, the wholly speculative effect of filling a judicial vacancy on the time line for adjudicating cases in the federal courts is precisely the type of "conjectural or hypothetical" harm that cannot confer Article III injury.

Second, petitioner did not establish that his alleged injury was "fairly traceable" to the challenged actions of the respondents. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The district court correctly held that "the chain of causation between the Senate's practices in considering nominations and the delays in processing nominations for judicial positions existing in the District of Utah is too remote to satisfy the second prong of standing." Pet. App. at 6a. Petitioner cannot demonstrate that

the Senate's referral of nominations to the Judiciary Committee *caused* any injury he alleged, as what action the Senate will take on a particular nomination and what action it would have taken under petitioner's preferred confirmation rules are entirely speculative.[3]

Third, petitioner's unprecedented request that the "Senate change its rules such that presidential judicial nominations not be denied full Senate consideration," Amd. Compl., Claim for Relief ¶ 1, would not predictively redress his claimed injury from alleged delays in the adjudication of cases pending in the federal courts. Even granting petitioner's requested relief, therefore, would not remedy his alleged injury.[4]

II. The court of appeals correctly declined petitioner's request to vacate the district court's dismissal of the amended complaint with prejudice to allow him to refile this suit in another judicial district. Pet. App. at 3a. Where, as here, jurisdictional defects cannot be cured, it is within the discretion of a district court to dismiss with prejudice. *Id*; *see also Bond v. Golden*, 273 F.2d 265 (10th

---

[3] Contrary to petitioner's contentions, Pet. at 11–12, he has not come close to the showing in *United States v. SCRAP*, 412 U.S. 669, 683–90 (1973), where the plaintiff environmental group alleged specific illegal action causing its members direct and imminent harms from depletion of natural resources and increased littering, or *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 73–74 (1978), where individuals suffering "immediate adverse effects" from living and working in dangerous proximity to nuclear power plants had standing to challenge a statutory limitation on the plants' accident liability.

[4] *Marbury v. Madison*, 5 U.S. 137 (1803), in no way supports petitioner's claim, Pet. at 12–13, that his alleged injury is redressable by a writ of mandamus to the Senate for contravening its duty to provide advice and consent as to judicial nominations. At issue in *Marbury* was the ministerial duty of the Secretary of State to deliver judicial commissions to individuals who had been nominated, confirmed, and appointed as District of Columbia judges. This case, by contrast, seeks to impose judicial supervision over the legislative process by which the Senate discharges its constitutional advice and consent duties.

Cir. 1959).[5] Even if the dismissal were without prejudice, *res judicata* would bar petitioner from relitigating this case in another court. "It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PATRICIA MACK BRYAN,
(Counsel of Record),
Senate Legal Counsel,
MORGAN J. FRANKEL,
Deputy Senate Legal Counsel,
GRANT R. VINIK,
THOMAS E. CABALLERO,
Assistant Senate Legal Counsel.

APRIL 2003.

○

[5] In addition to the lack of standing, adjudication of petitioner's claim was also barred by the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1; *see Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975); sovereign immunity, *see Keener v. Congress of the United States*, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam); and the political question doctrine, *see Nixon v. United States*, 506 U.S. 224 (1993); *Baker v. Carr*, 369 U.S. 186, 217 (1962).